

83-323

Office-Supreme Court, U.S.

FILED

AUG 26 1983

ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BRUCE CLEMMONS, PETITIONER

v.

JOHNSON BROTHERS WHOLESALE
LIQUOR COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF KANSAS

KENNETH F. CROCKETT
1324 Topeka Blvd.
Topeka, KS 66612
(913) 233-9665
Counsel of Record

REX W. HENOCH
1324 Topeka Blvd.
Topeka, KS 66612
(913) 233-9665

QUESTION PRESENTED

1. Whether refusal to enforce the Minnesota judgment in Kansas denies it full faith and credit under the Constitution.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	1
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons For Granting The Writ	7
Conclusion	12
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1

TABLE OF AUTHORITIES

Cases:

<u>Alaska Packers Association</u> <u>v. Industrial Accident</u> <u>Commission of California,</u> 294 U.S. 532, 79 L.Ed. 1044, 55 S.Ct. 518 (1935) .	11, 12
<u>Allstate Insurance Co. v.</u> <u>Hague,</u> 449 U.S. 302, 66 L.Ed.2d 521, 101 S.Ct. 633 (1981)	9
<u>Landon v. Artz,</u> 6 K.A.2d 617, 631 P.2d 1237 (1981) .	11, 12
<u>Milwaukee County v. M.E.</u> <u>White Co.,</u> 296 U.S. 268, 80 L.Ed. 220, 56 S.Ct. 229 (1935)	8

Cases:

Page

<u>Pink v. A.A.A. Highway</u>	
Express, 314 U.S. 201,	
86 L.Ed. 152, 62 S.Ct.	
241 (1941)	9

<u>Thomas v. Washington Gas</u>	
Light Co., 448 U.S.	
261, 65 L.Ed.2d 757,	
100 S.Ct. 2647 (1980)	10

Statutes:

K.S.A. 60-3002	12
----------------------	----

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. _____

BRUCE CLEMMONS, PETITIONER

v.

JOHNSON BROTHERS WHOLESALE
LIQUOR COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF KANSAS

Kenneth F. Crockett, on behalf of
Bruce Clemmons, petitions for a writ of
certiorari to review the judgment of the
Supreme Court of the State of Kansas in
this case.

OPINIONS BELOW

The opinion of the Supreme Court of
the State of Kansas (Appendix A, *infra*,
page A-1) is reported at 233 Kan. 405,
661 P.2d 1242. The opinion of the dis-
trict court (Appendix B, *infra*, page B-1)
is not reported.

JURISDICTION

The judgment of the Supreme Court was entered on April 29, 1983. A petition for rehearing was denied on June 3, 1983. (Appendix C, *infra*, p. C-1) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article IV, Section One of the United States Constitution provides:

"Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws, prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

2. Section 1738 of the Judiciary and Judicial Procedure Act of 1964, codified at 28 U.S.C. 1738, provides in relevant part:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated,

shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT

This is a proceeding brought in a district court of the State of Kansas to enforce a Minnesota judgment against Bruce Clemmons, petitioner. The action was brought pursuant to the Uniform Enforcement of Foreign Judgments Act, K.S.A. 60-3001, et seq.

On May 14, 1971, the respondent obtained a judgment in Minnesota against the petitioner and others in the amount of \$39,402.78. This judgment was rendered by the district court of Ramsey County, Minnesota. On December 7, 1971, the respondent filed an action in the district court of Shawnee County, Kansas,

based upon the Minnesota judgment to enforce that judgment in Kansas. The Kansas court entered summary judgment in favor of the respondent on February 15, 1972, in the amount of \$39,402.78 plus interest. On May 9, 1972, respondent attempted to levy execution in Kansas on the property of petitioner, but the execution was returned unsatisfied. Thereafter, no additional action was taken by respondent on that Kansas judgment, and it became dormant under the provisions of K.S.A. 60-2403. Respondent then failed to revive that judgment within two years after the date the judgment became dormant as required by K.S.A. 60-2404, thus rendering that judgment unenforceable in Kansas.

On September 24, 1973, respondent received payment of the sum of \$12,902.22 in partial satisfaction of the respondent's

judgment from a trustee in bankruptcy appointed by a federal court in Minnesota. Thereafter, no further action was taken by the respondent upon its 1971 Minnesota judgment until May of 1981 when respondent again initiated an action in the district court of Ramsey County, Minnesota, based upon the 1971 Minnesota judgment. On July 16, 1981, the Minnesota court entered a judgment in favor of the respondent in the amount of \$46,418.25 and costs. Thereafter, the respondent filed its 1981 Minnesota judgment in the district court of Shawnee County, Kansas, and proceeded to enforce the same in compliance with the Uniform Enforcement of Foreign Judgments Act.

On April 27, 1982, the district court of Shawnee County, Kansas, entered judgment in favor of the respondent holding the 1981 Minnesota judgment to be properly

filed and enforceable under the uniform act. The petitioners brought a timely appeal to the Supreme Court of the State of Kansas, which affirmed the lower court's decision. The Kansas Supreme Court found that the 1981 Minnesota judgment was entitled to full faith and credit under Article Four of the United States Constitution.

The Federal question here presented was specifically raised in the court of first instance (the District Court of Shawnee County, Kansas, Division Three) on December 11, 1981, by petitioner's timely memorandum in response to plaintiff's order to show cause. The question was raised in the Supreme Court of the State of Kansas by petitioner's appellate brief to that court (Appendix A, p. A-1). Each court ruled that the 1981 Minnesota judgment was entitled to full faith and

credit under Article IV, Section One of the United States Constitution. Petitioner's Federal claim was thus made at the earliest opportunity and was renewed at each stage of the proceedings below.

REASONS FOR GRANTING THE WRIT

This case presents an important federal question concerning the full faith and credit required to be given a foreign judgment sued upon in Kansas, and then subsequently filed in Kansas pursuant to the Uniform Enforcement of Foreign Judgments Act.

The 1971 Minnesota judgment, originally sued upon in Kansas in 1971, was rendered unenforceable in Kansas due to lapse of time. Thereafter, in 1981, Respondent obtained a "new" judgment in Minnesota, based upon the 1971 judgment. Minnesota law allows a new action to be filed on an old judgment within ten years

following the entry of judgment. Such "new" judgment then has a ten year life of its own. Armed with this judgment, Respondent then returned to Kansas and registered it pursuant to the Uniform Enforcement of Foreign Judgments Act. As such, the Kansas Supreme Court held that the "new" judgment was entitled to full faith and credit under the Constitution.

This ruling seriously misconstrues the mandate of the Full Faith and Credit Clause, and this Court's rulings interpreting that Clause. The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several states from independent sovereignties into a single unified Nation. Milwaukee County v. M.E. White Co., 296 U.S. 268, 276, 80 L.Ed. 220, 56 S.Ct. 229 (1935). It implements this design by directing that

a state, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other states and avoid infringement upon their sovereignty. Allstate Insurance Co. v. Hague, 449 U.S. 302, 322, 66 L.Ed.2d 521, 101 S.Ct. 633 (1981).

The Full Faith and Credit Clause is not, however, an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own. This Court has often recognized that, consistently with the appropriate application of the Full Faith and Credit Clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another. Pink v. A.A.A. Highway Express, 314 U.S. 201, 210, 86 L.Ed. 152, 62 S.Ct. 241 (1941).

The very nature of the federal union of states, to which are reserved some of

the attributes of sovereignty, precludes resort to the Full Faith and Credit Clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with the subject matter concerning which it is competent to legislate. Thomas v. Washington Gas Light Co., 448 U.S. 261, 65 L.Ed.2d 757, 100 S.Ct. 2647 (1980). Where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. A rigid and literal enforcement of the Full Faith and Credit Clause, without regard to the statute of the forum, would lead to the absurd result that wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Alaska Packers Association v.

Industrial Accident Commission of California, 294 U.S. 532, 547, 79 L.Ed. 1044, 55 S.Ct. 518 (1935).

Petitioner is not attempting to impeach the Minnesota judgment, nor requesting this Court to open the merits and review the cause. The effect herein is not to deny the right of the judgment creditor to sue at all, under any circumstances. Nor is it that no day is given to such creditor, or that the prohibition is absolute in that no action shall be maintained on a judgment or decree of a foreign court. Respondent had its day in 1971. To now deny enforcement of the 1981 Minnesota judgment would thus, not be in violation of the Full Faith and Credit Clause. A foreign judgment, once properly filed in Kansas, is treated exactly like a Kansas judgment of a district court in Kansas. Landon v. Artz, 6 K.A.2d 617, 618, 631

P.2d 1237 (1981); K.S.A. 60-3002. Since the 1971 judgment, sued upon in Kansas, is now unenforceable in Kansas, so too is the 1981 judgment. To the extent that Kansas is now required to give full faith and credit to the Minnesota statute, it must be denied the right to apply in its own courts its own statutes regarding revival. The Full Faith and Credit Clause does not go so far.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Kansas.

Respectfully submitted,

KENNETH F. CROCKETT
REX W. HENOCH
Counsel for Petitioner

No. 54,890

JOHNSON BROTHERS WHOLESALE LIQUOR CO.,

Plaintiff/Appellee,

v.

BRUCE CLEMMONS,

Defendant/Appellant.

SYLLABUS BY THE COURT

1. The Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, does not prevent the forum state from applying its own statute of limitations to a sister state's judgments, provided the statute or limitations of the forum does not discriminate against out-of-state judgments and does not deny, unreasonably restrict, or oppressively burden the right to bring such an action to enforce such judgment.

2. Where an action is brought in another state upon a judgment of a sister

state which is a revival of an earlier judgment and under the law of the state rendering the revival judgment, it is a new judgment and not merely an extension of the statutory period in which to enforce the original judgment, a judgment of revival, as a new judgment, is entitled to full faith and credit and may not be refused enforcement on the ground that under the law of the forum the original judgment could not have been revived at the time it was revived by the judgment of the sister state.

3. In an action on a foreign judgment, its nature, validity, and finality are to be tested by the law of the jurisdiction where the judgment was rendered.

Appeal from Shawnee district court;
E. NEWTON VICKERS, judge. Opinion filed
April 29, 1983. Affirmed.

Kenneth F. Crockett, of Tilton,
Dillon, Beck & Crockett, of Topeka, argued

the cause and was on the briefs for the appellant.

Robert L. Baer, of Cosgrove, Webb & Oman, of Topeka, argued the cause, and J. Craig Anderson, of the same firm, was with him on the briefs for the appellee.

The opinion of the court was delivered by

PRAGER, J.:

This is a proceeding to enforce a Minnesota judgment under the Uniform Enforcement of Foreign Judgments Act, K.S.A. 60-3001 et seq. The plaintiff-appellee is Johnson Brothers Wholesale Liquor Co. The defendant-appellant is Bruce Clemmons.

The facts in the case are not in dispute and are as follows: On May 14, 1971, the plaintiff obtained a judgment in Minnesota against the defendant and others in the amount of \$39,402.78. This judgment was rendered by the district court of

Ramsey County, Minnesota. On December 7, 1971, the plaintiff filed an action in the district court of Shawnee County based upon the Minnesota judgment. The Kansas court entered summary judgment in favor of the plaintiff on February 15, 1972, in the amount of \$39,402.78 plus interest. On May 9, 1972, plaintiff attempted to levy execution on the property of the defendant but the execution was returned unsatisfied. Thereafter, no additional action was taken by plaintiff on that Kansas judgment, and it became dormant under the provisions of K.S.A. 60-2403. Plaintiff failed to revive that judgment within two years after the date the judgment became dormant as required by K.S.A. 60-2404.

On September 24, 1973, plaintiff received payment of the sum of \$12,902.22 in partial satisfaction of the plaintiff's judgment from a trustee in bankruptcy

appointed by a federal court in Minnesota. Thereafter, no further action was taken by the plaintiff upon its 1971 Minnesota judgment until May of 1981 when plaintiff initiated an action in the district court of Ramsey County, Minnesota, based upon the 1971 Minnesota judgment. The record shows that personal service in that action was made on the defendant in Shawnee County on May 12, 1981. On July 16, 1981, the district court of Ramsey County, Minnesota, entered a new judgment in favor of the plaintiff in the amount of \$46,418.25 and costs. Thereafter, the plaintiff filed its 1981 Minnesota judgment in the district court of Shawnee County and proceeded to enforce the same in compliance with the Uniform Enforcement of Foreign Judgments Act (K.S.A. 60-3001 et seq.).

On April 27, 1982, the district court of Shawnee County entered judgment in favor of the plaintiff holding the 1981

Minnesota judgment to be properly filed and enforceable under the uniform act. The defendant has brought a timely appeal to this court.

The primary issue presented in the case is whether the 1981 Minnesota judgment is enforceable under the factual circumstances set forth above. In determining this issue we must consider the Kansas statute of limitations, the Kansas statutes pertaining to dormant judgments and revivor of the same, and the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1.

K.S.A. 60-3001 defines a foreign judgment to include any judgment, decree or order of any other court which is entitled to full faith and credit in this state. K.S.A. 60-3002 provides that a judgment filed pursuant to the act has the same effect and is subject to the same procedures, defenses, and proceedings as a

judgment of a district court of this state and may be enforced or satisfied in like manner. K.S.A. 60-3006 declares that the right of a judgment creditor to bring an action to enforce his or her judgment instead of proceeding under the uniform act remains unimpaired.

The Kansas statute of limitations governing actions brought on foreign judgments is K.S.A. 60-511(5) which sets a period of limitation of five years for an action for relief not provided for otherwise in the article governing the statute of limitations. See Leonard v. Kleitz, 155 Kan. 626, 127 P.2d 421 (1942); Rice v. Moore, 48 Kan. 590, 30 Pac. 10 (1982); Alexander Construction Co. v. Weaver, 3 Kan. App. 2d 298, 594 P.2d 248 (1979). In passing, it should be noted that K.S.A. 60-516 provides that where the cause of action has arisen in another state and where the cause of action cannot be main-

tained thereon by reason of lapse of time, no action can be maintained in this state except in favor of one who is a resident of this state and who has held the cause of action from the time it accrued.

K.S.A. 60-2403 provides, in substance, that if execution shall not be sued out within five years from the date of any judgment rendered in any court of record of this state or within five years from the date of any order reviving such judgment or, if five years have intervened between the date of the last execution issued on any judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor. When a judgment shall become dormant and shall so remain for a period of two years, it is the duty of the clerk of the court to release the judgment of record.

K.S.A. 60-2404 provides, in substance, that a dormant judgment may be revived within two years of the date on which such judgment became dormant. The holder is required to file a motion for a revivor and a request for the immediate issuance of an execution thereof if such motion is granted. As noted above, the judgment obtained by plaintiff in Shawnee County district court on February 15, 1972, became dormant and was not revived under the statutory provisions. In Kansas, under these statutes, a party may, by the issuance of an execution every five years, keep a judgment alive indefinitely. The judgment remains in force without execution for five years, and the plaintiff may revive it at any time within two years if it has become dormant thereafter, so that a plaintiff may neglect his judgment for seven years, lacking a day, and then revive it and put it in force for five years more. Riney v. Riney, 205

Kan. 671, 680, 473 P.2d 77 (1970).

The Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. The United States Supreme Court and other federal courts have consistently held that the Full Faith and Credit Clause does not prevent the forum state from applying its own statute of limitations to a sister state's judgments, provided the statute of limitations of the forum does not discriminate against out-of-state judgments and does not deny, unreasonably restrict, or oppressively burden the right to bring such an action to enforce such judgment. The leading case that recognizes this principle is M'Elmoyle vs. Cohen, 38 U.S. (13 Pet.) 312, 10 L.Ed. 177 (1839). Many cases following

the rule are cited in the annotation in 36 A.L.R. 2d 567 and also in the annotation found at 17 L.Ed. 2d 952.

Thus, it has been recognized that a state may refuse to enforce the judgment of a sister state, where an action on that judgment is brought later than the applicable statute of limitations of the forum permits, even though the judgment would not have been barred in the state which rendered it.

The principle is also well established that, where an action is brought in another state upon a judgment of a sister state which is a revival of an earlier judgment, and under the law of the state rendering the revival judgment it is a new judgment and not merely an extension of the statutory period in which to enforce the original judgment, a judgment of revival, as a new judgment, is entitled to full faith and credit and may not be refused enforce-

ment on the ground that under the law of the forum the original judgment could not have been revived at the time it was revived by the judgment of the sister state. The rule has been applied both where the judgment of revival was rendered in the state where the original judgment had been rendered (Union National Bank v. Lamb, 337 U.S. 38, 93 L.Ed. 1190, 69 S.Ct. 911 (1949), rehearing denied 337 U.S. 928), and also where the judgment of revival was rendered in a sister state. Roche v. McDonald, 275 U.S. 449, 72 L.Ed. 365, 48 S.Ct. 142 (1928). This principle was recognized in Tanner v. Hancock, 5 Kan. App. 2d 558, 619 P.2d 1177 (1980).

The controlling question in this case is whether the 1981 Minnesota judgment was a new judgment and not merely an extension of the statutory period in which to impose the original judgment. This court has held that in an action on a

foreign judgment its nature, validity, and finality are to be tested by the law of the jurisdiction where the judgment was rendered. Baker v. Erbert, 199 Kan. 59, 62, 427 P.2d 461 (1967). Here, the issue of whether the 1981 Minnesota judgment was a valid new judgment must be determined under the Minnesota statutes and case law. Under Minn. Stat. Ann. Section 550.01 (West 1947), a party in whose favor a judgment is given may proceed to enforce the same at any time within ten years after the entry thereof. Minn. Stat. Ann. Section 548.09 provides, in substance, that a judgment shall survive, and the lien thereof continue, for a period of ten years next after its entry. Minn. Stat. Ann. Section 541.04 provides that no action shall be maintained upon a judgment unless begun within ten years after the entry of such judgment. Under Minnesota case law, where a new action is

filed on an old judgment during the ten-year period, the judgment creditor obtains a new judgment which thereafter has a ten-year life of its own. Sandwich Manuf'g Co. v. Earl, 56 Minn. 390, 397, 57 N.W. 938 (1894). That case is cited in Good v. Kleinhammer, 122 Kan. 105, 108, 251 Pac. 405 (1926).

In this case, the district court held that it was bound to follow the substantive law of Minnesota, the state in which the 1981 judgment was entered. It cited Sandwich Manuf'g Co. v. Earl and pointed out that, according to Minnesota substantive law, the judgment entered on July 16, 1981, was a new judgment and not merely a revival or extension of the judgment entered in 1971. The trial court then concluded that, because the Minnesota judgment of July 16, 1981, was only four months old at the time the suit was commenced in Shawnee County District Court, the Kansas

statute of limitations is not a bar to this action. We approve the rationale of the trial court under the statutes and case law cited above. It follows that the judgment of the district court must be affirmed.

Judgment affirmed.

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS

DIVISION THREE

JOHNSON BROTHERS WHOLESALE
LIQUOR COMPANY,

Plaintiff,

vs.

No. 81U504

BRUCE CLEMMONS,

Defendant.

MEMORANDUM DECISION AND ORDER

This matter is before the Court as a result of plaintiff's Order to Show Cause. After due consideration the matter comes on now for decision.

FINDINGS OF FACT

1. In 1971, a petition was filed on behalf of plaintiff in this Court. No. 117,606, stating a cause of action upon a judgment entered in Minnesota against defendant.

2. On July 16, 1981, this same plaintiff received a judgment against this same defendant in Minnesota arising out of the same transaction.

3. Plaintiff now seeks to enforce this judgment under the Uniform Enforcement of Foreign Judgments Act, KSA 60-3001 et seq.

CONCLUSIONS OF LAW

1. This Court, in applying KSA 60-3001 et seq is bound to follow Minnesota substantive law, the state in which the judgment was entered. See Baker v. Erbert, 199 Kan. 59, 62 (1967).

2. According to Minnesota substantive law, the judgment entered in that state on July 16, 1981, was a new judgment and not the revival or extension of the judgment entered there in 1971. See Sandwich Manufacturing Co. v. Earl, 56 Minn. 390, 397, 57 N.W. 938 (1894); Judg-

ments, Limitations Upon Actions, Executions and Liens, 24 Minn. L. Rev. 660 (Ap. 1940). The rule enunciated in Sandwich Mfg Co., supra was cited with approval by the Kansas Supreme Court in Good v. Kleinhammer, 122 Kan. 105, 108, 251 P. 405 (1927).

3. Because the Minnesota judgment of July 16, 1981, was only four months old at the time suit was commenced here, the Kansas statute of limitations is not a bar to this action.

IT IS SO ORDERED.

E. NEWTON VICKERS
Judge, Division III

Dated: 4-7-82

IN THE SUPREME COURT
OF THE STATE OF KANSAS

JOHNSON BROTHERS WHOLESALE
LIQUOR COMPANY,

Appellee,

vs.

No. 82-54890-AS

BRUCE CLEMMONS,

Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion for rehearing.

Denied.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date: June 3, 1983